OFFICE SUPREME COURT U. S.
FILED
DEC 14 1880
JAMES H. McKENNEY, Clerk.

United States Supreme Court,

OCTOBER TERM, 1880.

(No. 150.)

LEOPOLD BAMBERGER,

PLAINTIFF IN ERROR.

vs.

GEORGE E. TERRY, RECEIVER,

DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

BRIEF OF DEFENDANT IN ERROR.

S. W. KELLOGG,

GEO. E. TERRY,

FOR DEFENDANT IN ERROR.

1880:
KING & MALONE, PRINTERS,
WATERBURY, CONN.

Supreme Court of the United States,

OCTOBER TERM, 1880.

NO. 150.

LEOPOLD BAMBERGER, PLAINTIFF IN ERROR,

VS.

GEO. E. TERRY, RECEIVER, DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the District of Connecticut.

STATEMENT.

It appears by the record, that this action was originally brought to the February term, 1876, of the Superior Court for New Haven County, State of Connecticut. Personal service was made upon the Plaintiff in error, he being found within said State and within the jurisdiction of said Court.

Motion was made to erase said cause from the docket of said Court, for defective service, but was denied. See record pp. 4, 5 and 6. To which ruling a bill of exceptions was filed, p. 4, but stipulated to be withdrawn, p. 13.

Said cause was thereupon removed to the Circuit Court of the United States for the District of Connecticut, by the Plaintiff in error, where trial was had to the Court, the parties having stipulated in writing to waive a jury, p. 13, Shipman, J., found the following facts:

For a long time prior to August 12, 1875, the firm of S. A. Castle & Co., of the City of New York, were the selling agents of the United States Button Co., a joint stock corporation, organized under the Statute laws of the State of Con-

17 necticut, and located in Waterbury, in said State. At said time said firm had in their store in New York, for sale on commission, a large amount of goods belonging to said corporation, said firm had given their accommodation acceptances to said corporation in a large amount, which had been negotiated by said corporation and were then outstanding, with an agreement between the parties, that said firm should at all times have a lien upon any goods of said corporation, so held by them unsold, to secure them against said acceptances. Said firm of S. A. Castle & Co., on said 12th day of
18 August, 1875, made an assignment in insolvency for the benefit of their creditors, under the Statute laws of the State of New York, to Leopold Bamberger, the plaintiff in error, who on said day qualified and entered upon his duties as such assignee.

Said firm at the time of their assignment, made and filed an inventory, pursuant to the laws of said State, in which the goods of said corporation were particularly specified, the assignee thus had notice of the ownership of the goods, yet he took the same into his possession and immediately began
19 to sell the same, for the benefit of the creditors of said firm.

On the 24th day of September, 1875, said corporation being then the owner of all the accommodation acceptances of said firm, outstanding at the date of their said assignment, by their president in New York, tendered the same to said assignee of said firm, and demanded the goods belonging to said corporation, who refused to surrender the same, and continued the sale thereof.

On or about the 7th day of November, 1875, the defendant
20 in error, was appointed Receiver of the goods and estate of said corporation, by the Superior Court of New Haven County, State of Connecticut, under and by virtue of the 23d Section, Chapter I, of Title XVII, of the General Statutes, (revision 1875, page 281) and was authorized by the decree of said Court, to execute the powers specified in the 1st Section of part XIV, Chapter XVII, Title XIX, of said Statutes, (revision 1875, page 482). He thereupon accepted said trust, gave bonds to the acceptance of said Court, and

entered upon the duties of his said appointment.

On the 24th of November, 1875, the defendant in error, accompanied by the secretary of said corporation, in the city of New York, tendered said acceptances to said assignee and demanded said goods as the property of said corporation. Said assignee refusing to surrender the same, he was asked if there were any other acceptances outstanding, or if there were any other claims or charges against the goods, for interest, commissions, etc., except the tendered drafts, to which he replied in the negative. 21

At the close of the testimony the defendant in error asked and obtained leave, against the objection of the plaintiff in error, to amend the declaration by the addition of the 2d and 3d counts for a conversion prior to the appointment of the defendant in error as Receiver. 22

Opportunity was given the plaintiff in error, after the allowance of said amendments, to introduce additional testimony if he desired.

As to the law applicable to the foregoing facts:

23

I.

The State Court to which the action was first brought had jurisdiction over the parties thereto.

A. If there was any defect in the service of the process by reason of its being served by the City Sheriff, (who it is claimed had no power to serve process returnable to the Superior Court,) it was only voidable, and could only be taken advantage of by plea in abatement, or motion to dismiss, before the party had submitted to the jurisdiction of the Court. 24

B. Want of jurisdiction over the parties to the suit may be waived, in which case the court acquires jurisdiction by consent of the parties.

Ives vs. French, 22 Conn. R. 101.
32 Conn. R. 111, *note.*
Segee vs. Thomas, 3 Blatch. R. 11.

C. By the rules of practice in the State Court, pleas

25 abatement must be filed on or before the second opening of the court.

Practice Rules, Chapter 18, Sec. 1, found in 18 Conn. R. 576.

If a formal plea for such a defect cannot be filed after the second day, upon what principle can a motion to dismiss for the same cause be made at a later day? They are both purely in abatement whether by plea or motion.

D. Where no service is made upon the Defendant, and he appears by attorney, without pleading such want of jurisdiction, it is a waiver of the objection and the Court acquires

26 full jurisdiction of the parties.

Sanford vs. Sanford, 5 Day. R. 358.
Payne vs. Farmers and Citizens Bank, 29 Conn. R. 416.
Hotchkiss Appeal, 32 Conn. R. 355.
Kellogg vs. Brown, 32 Conn. R. 108, *note* 111.
Cook vs. Morse, 40 Conn. R. 544.
Vernon vs. West School District, 38 Conn. R. 112.

E. It is admitted that if the Court had no jurisdiction of the subject matter of the suit, then the defendant would not be confined to a plea in abatement or motion to dismiss within the first two days, but a motion to dismies would be

27 in order at any stage of the proceedings. But no such claim was made in this case. The Court properly held that the motion came to late. Record, p. 5.

F. The Plaintiff in error filed exceptions to the ruling of the Court, Record p. 4, and afterwards filed his motion to remove said cause to the Circuit Court; while there pending he withdrew his exceptions by stipulation, Record p. 13; he therefore voluntarily submitted to the jurisdiction of the Court.

G. Still further, the General Assembly of Connecticut at

28 its May Session, 1876, passed an act enlarging the powers of said City Sheriff, and confirming his previous doings.

Special Acts of Conn., May Session, 1876, page 6.

So the Circuit Court had full jurisdiction of the parties, both by Statutory enactment and by voluntary consent.

II.

There is no claim but that the defendant in error, was duly and legally appointed and qualified as receiver of said

corporation. As such he had full power and authority to bring suits, either in his own name or in the name of the corporation, in any of the Courts of the State of Connecticut having jurisdiction of the parties, to recover any property belonging to said corporation. 29

General Statutes of Connecticut, Revision 1875, page 482, Section 1.

A. The property sought to be recovered belonged to the corporation. The firm of S. A. Castle & Co., had no interest in it, other than as security for the payment of their acceptances. The plaintiff in error as assignee of said firm acquired no greater interest than they had, he took it as such assignee, with notice of the rights of said corporation, it being stated in the schedule filed with the deed of assignment, and upon the tender of the acceptances and demand for the property, and a refusal to surrender the same, the plaintiff in error became liable to the corporation for a conversion. 30

We have before shown that the defendant in error, had full power to bring an action for such conversion either in the name of said corporation, or in his own name.

B. It matters not that said property was and had been since the appointment of said Receiver, in the State of New York; the corporation had full right to the property and the Receiver the right to its possession to administer upon, even though in New York, against every one except perhaps, creditors of said corporation, citizens of New York who sought to avail themselves of it there. 31

Hoyt vs. Thompson, 5 N. Y. (1 Selden) 320, 338, 351.

C. The plaintiff in error had no right to the property, after the tender of the acceptances, and whether the corporation in its own name, or the Receiver acting under authority of the State Court, sought to claim it, he was a wrong doer, and cannot on the pretense that the property was beyond the jurisdiction of the Courts of the State of Connecticut, excuse his conduct. He knew if he surrendered the property to the Receiver, it would be accounted for to the State Court for the benefit of the creditors of said corporation, and his responsibility for its safe custody would 32

cease.

33 **D.** No title vested in the Receiver, nor does the Statute pretend to change the title either to property in the State of Connecticut or elsewhere. The title is still in the corporation; possession with power to sell is only conferred upon the Receiver, and any suit he may bring is solely for the benefit of said corporation. Such is the construction placed upon similar statutes.

Willink vs. Morris Canal and Banking Co., 3 Green. Ch. 377.

E. It may be claimed that the plaintiff in error, converted the property prior to the appointment of the receiver,
34 but this is immaterial provided the amendments alleging a conversion prior to his appointment were properly allowed.

III.

The amendments were properly allowed by the Court in conformity with the practice in the State Courts, within its discretion and authorized by Statute.

General Statutes of Connecticut, Revision 1875, page 426, section 1.

North vs. Nichols, 39 Conn., R. 355.
35 Buckley vs Andrews, id. 523.

They were also authorized by the Act of Congress.

U. S. Revised Statutes, page 948, section 954.

A. The allowance of the amendments being discretionary with the Court, cannot be reviewed on error.

Merriman vs. Langdon, 10 Conn., R. 460.
Husted vs. Greenwich, 11 Conn., R. 383.
Betts vs. Hoyt, 13 Conn., R. 469.
McAllister vs. Clark, 33 Conn., R. 253.
Hollister vs. Hollister, 38 Conn., R. 178.
Buckley, ex. vs. Andrews, 39 Conn., R. 523.
United States vs. Buford, 3 Peters, 32.
36 Exparte Bradstreet, 7 Peters, 634.

IV.

The Receiver had a right of action at the commencement of the suit, and was entitled to recover for a conversion prior to his appointment.

Gillett vs. Fairchild, 4 Denio, 80.
Delano vs. Curtiss, 7 Allen, 470.
Carpenter vs. Hale, 8 Gray, 157.

V.

The plaintiff in error had no right to insist upon a jury trial, after the allowance of the amendments. He stipulated in writing to waive a jury trial, which was competent for him to do. U. S. Revised Statutes, 2 Ed., page 118, section 649. And proceeded to trial to the Court.

Having once waived his right, he would not be permitted to trifle with the Court, by withdrawing his waiver upon some caprice or whim, and insist upon a jury trial.

A. The amendments relate back to the commencement of the action and the plaintiff in error had full knowledge when he stipulated to waive a jury trial, that amendments might be made.

Robbins vs. Bacon, 1 Root 348.
New Haven Bank vs. Miles, 5 Conn. R. 587.
Dana vs. McClure, 39 Vt. R. 197.

B. The amendments raised no new issue not already presented to the court.

They simply allege possession in the corporation and a conversion by the plaintiff in error, before the appointment of the Receiver.

Evidence of such conversion, was introduced without objection, and the Court finds that the officers of the corporation, tendered the acceptances to the plaintiff in error and demanded the goods, prior to the appointment of the Receiver. Record, p. 16.

The plaintiff in error had opportunity to offer any additional evidence, after the allowance of the amendments, Record, page 16. This was also in accordance with the practice in the State Courts.

General Statutes Conn., Revision 1875, page 427.

No injustice was done him; it appears to us to have been an effort on his part to make delay.

C. After the allowance of the amendments, no claim was made but that the defendant in error, then had a good cause of action and was entitled to judgment on the amended counts.

The claim was simply, objection to the allowance of the

41 amendments, and for a trial by jury.

It seems to us that there is no substantial foundation for these claims, one was within the discretion of the court, the other had been waived by the party.

42

43

44

APPENDIX TO BRIEF OF DEFENDANTS IN ERROR,

No. 150.

Sections from Connecticut Statutes, Revision 1875, *referred to in Brief for Defendants in Error.*

"SEC. 23. The superior court in the county in which any corporation organized under the laws of this State has its principal place of business, may, as a court of equity, on the application of any of its stockholders, wind up its affairs and dissolve it, if said court shall find that said corporation has voted to wind up its affairs, or abandoned the business for which it was organized, and has thereafter neglected, within a reasonable time or in a proper manner, to wind up its affairs and distribute its effects among its stockholders; and for this purpose may, if it deems it necessary, appoint one or more receivers of the estate of said corporation, and limit a time for its creditors to present their claims to such receivers, and direct public notice thereof to be given; and all claims not presented within such time shall be barred. Said receivers shall allow all just claims against said corporation, collect its debts, sell its property, and convert the same into money, and report their doings to said court as it may direct," p. 281.

"SEC. 1. Receivers of a corporation, appointed by judicial authority, shall have the right to the possession of all its books, papers, and property, and power in their own names, or in its name, to commence and prosecute suits for and on behalf of said corporation; to defend all suits brought against it or them; to demand and receive all evidences of debt and property belonging to it, and to do and execute in its name, or in their names, as such receivers, all other acts and things which shall be necessary or proper in the execution of their trust; and shall have all the powers for any of said purposes possessed by said corporation," p. 482.

"SEC. 1. * * * But after any such amendment, the defendant shall have reasonable time to answer the same," p. 427.

Special Acts of Connecticut, May Session, A. D. 1876.

"SEC. 2. All processes regularly served, heretofore directed to and served by said city sheriff, within the territorial jurisdiction of said city court, shall be good and valid, as if directed to and served by the sheriff of the county within which such service was made," p. 6.

We claim the appeal to be frivolous, and for delay; and ask for ten per cent. damages under the rule, besides interest.

S. W. KELLOGG,
GEO. E. TERRY,
For Defendants in Error.

